IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11-12-2007

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THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

W.P.No.17601 of 2007
and
MP Nos.1 to 3 of 2007

N.Jothi .. Petitioner

vs

1.Election Commission of India
Nirvachan Sadhan
Ashoka Road
New Delhi 110 001.
2.A.Amernath Rao .. Respondents

Writ petition filed under Article 226 of the Constitution of India praying for a writ of mandamus to direct the first respondent herein to confine the intended enquiry in Reference Case No.43 of 2006 on the allegations contained in the petition of the 2nd respondent dated 24.3.2006 by forbearing the 1st respondent from enquiring into any other allegation which was not referred in terms of Article 103 of the Constitution of India to the 1st respondent.

For Petitioner : Party in person
For Respondents : Mr.G.Rajagopal
Senior Counsel
for M/s.G.R.Associates
for R1

Mr.R.Viduthalai
Senior Counsel
for Mr.M.Dhandapani for R2

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ORDER

Invoking the writ jurisdiction of this Court, the petitioner, a Member of Parliament in the Rajya Sabha, has sought for a writ of mandamus to direct the first respondent herein to confine the intended enquiry in Reference Case No.43 of 2006 on the allegations contained in the petition of the second respondent dated 24.3.2006, by forbearing the first respondent from enquiring into any other allegation which was not referred in terms of Article 103 of the Constitution of India to the first respondent.

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2.The affidavit in support of the petition, the additional affidavit and the counter affidavits filed by the respondents are perused. The Court heard the deliberations made by the petitioner in person and also the learned Senior Counsel Mr.G.Rajagopal, for the first respondent Election Commission of India and also the learned Senior Counsel Mr.R.Viduthalai, for the second respondent.

3.The facts and circumstances which led the petitioner to file the instant writ petition can be stated thus:

(a) The petitioner, a practicing Advocate for more than three decades, was elected as Member of Parliament in the Rajya Sabha from the State of Tamil Nadu on the AIADMK party ticket during April 2002. He is also a Member of number of Committees constituted in the Rajya Sabha. Alleging that the petitioner has incurred disqualification for being a Member of Parliament in terms of Article 102 of the Constitution of India, by reason of his appointment as defence counsel of the then Chief Minister of the State of Tamilnadu, the second respondent and forty others lodged a complaint before His Excellency, the President of India, on 24.3.2006. The prime allegation made in the complaint, was to the effect that the petitioner was holding the post of a Senior Defence Counsel for the then Chief Minister of Tamilnadu in several of her cases instituted by both the Central Government and the Tamil Nadu State Government, and that he was earning moneys and several benefits monetarily as an Official Counsel for the Hon'ble Chief Minister of the State; and that he had not suspended his practice as an Advocate on becoming a Member of Parliament. The said complaint was referred to the first respondent for its opinion from the Secretariat of the President of India under Article 103 of the Constitution of India, on 17.4.2006. Thus, the opinion of the first respondent was sought for by the Office of the President of India under Article 103(2) of the Constitution of India only on the allegations found in the representation of the second respondent dated 24.3.2006. After receiving the said communication, the first respondent called upon the second respondent to furnish the precise information about the date of appointment of the petitioner to the alleged Office and all relevant documents to support his contention by May 15, 2006. But, the second respondent complainant did not furnish the requested details within the prescribed time. While the matter stood thus, the first respondent had written to the Chief Secretary to Government of Tamilnadu by a communication dated 18.8.2006, to furnish the exact date of appointment of the petitioner as Senior Defence Counsel to the former Chief Minister together with the terms and conditions of the appointment and the terms regarding the payment of fees and emoluments.

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(b) The query was specific to the following effect.

"(a) Whether Shri N.Jothi, MP (Rajya Sabha) was appointed by the State Govt. as its counsel/counsel

for the former Chief Minister as claimed in the petition filed before the Hon'ble President of India by one Shri R.Amernath Rao, at any point of time after 30.4.2002 (the date from which the current term of Shri N.Jothi as Member of the Rajya Sabha commenced.

(b) If he was so appointed by the State Government, a copy of the order relating to the said appointment and copies of documents relating to terms and conditions of the appointments including the terms regarding payment of fees and emoluments, may be submitted to the Commission."

(c) Pursuant to the query made, the Chief Secretary to the Government of Tamilnadu responded to the said communication by letter dated 20.10.2006, wherein he did not assert that the petitioner was appointed to the post of Senior Defence Counsel to the former Chief Minister by the Government of Tamilnadu. But, the communication inter alia was to the effect that the petitioner had allegedly attended the Cauvery Water Dispute matters and performed air journeys to New Delhi in that regard. The cost of the air tickets in connection with the same were settled by the Public Works Department, Government of Tamilnadu, and the Counsel appeared on behalf of the State of Tamilnadu though eligible for the fees, the petitioner had not claimed any fee, and further, the petitioner was allotted accommodation by the Parliamentary Secretariat; but, the petitioner has also been occupying Room No.209 in Tamilnadu House, New Delhi, and moneys were due from the petitioner towards the room rent, catering charges etc. Thus, the said communication was to the effect that the petitioner also enjoyed the above mentioned privileges without no formal orders at the cost of the State Government.

(d) On receipt of a communication which is dated 4.12.2006, from the first respondent calling upon the petitioner to file a written statement on or before 22.12.2006 supported by proper affidavits, in reply to the allegations contained in the complaint made by the second respondent dated 24.3.2006, and also the letter dated 20.10.2006, of the Chief Secretary of the Government of Tamilnadu, the petitioner came to know about all the facts and events narrated above. Then, the petitioner wrote to the first respondent on 20.12.2006, seeking details of the persons mentioned in the representation dated 24.3.2006, inter alia, to ascertain their authenticity, bona fides and credibility and accordingly to enable the petitioner to finalise his response. The petitioner also sought by the same communication that the copies of the records said to be relied upon in the communication dated 20.10.2006, of the Chief Secretary to the State of Tamilnadu, for finalising his detailed response. It was also stated in the same communication that after filing the statement, on receipt of the said documents/details as sought for, if any enquiry was still necessary by the Election Commission, he would participate in the proceedings. It is also made clear that the request for the documents was not to be construed as submission on the merits of the case, which he denied and reserved liberty to raise all the objections to that properly on receipt of the aforesaid

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materials. The first respondent sent a reply on 4.1.2007. The first signatory in the complaint dated 24.3.2006, is the second respondent herein "as the main petitioner".

(e) Regarding the supply of authenticated copies and records relied on in the communication dated 20.10.2006, of the Chief Secretary to the Government of Tamilnadu, it was stated that the details of the exchange order and ticket number provided by the State Government for air journeys which were performed by the petitioner to attend Cauvery Water Dispute matter and which were purportedly certified by the petitioner, were already provided in the letter. The petitioner was called upon to file his written statement latest by 19.1.2007 on the basis of the materials already furnished to the Commission's notice dated 4.12.2006. The petitioner was also further informed that no further time would be allowed "under any circumstances".

(f) Except the second respondent, the identity of any of the other 40 persons was not known to the petitioner. On receipt of the said communication, the petitioner filed a detailed preliminary submissions/objections on 18.1.2007 as to the scope of the enquiry sought to be undertaken by the first respondent Election Commission by its notice dated 4.12.2006, read with the communication dated 4.1.2007. The petitioner raised objections inter alia to the notice of enquiry dated 4.12.2006, that the first respondent should desist from undertaking any enquiry on the information furnished by the State Government of Tamilnadu in the letter dated 20.10.2006, in addition to the issues raised in the complaint dated 24.3.2006, by the second respondent and others. The petitioner also requested the Election Commission that in the event of the first respondent proceeding with any further enquiry notwithstanding his objections, he might be communicated accordingly so that he might take proper steps in the matter.

(g) On receipt of a copy of the preliminary objection, the second respondent filed a rejoinder before the Election Commission to the preliminary objections filed by the petitioner, on 22.3.2007. Fixing the hearing date on 10.5.2007, in the Secretariat of the Election Commission of India, New Delhi, a notice dated 12.4.2007, was served upon the petitioner. On receipt of the said notice for the hearing on 10.5.2007, the petitioner addressed a communication to the Election Commission referring to the preliminary objections already made by him, and requested the Election Commission to intimate its programme on the point whether the hearing fixed on 10.5.2007, was confined to the preliminary objections/submissions or general in nature covering all issues. Under the stated circumstances, the petitioner has filed the writ petition on 8.5.2007 for the aforesaid reliefs.

4.Advancing his arguments, the petitioner in person would submit that the second respondent has placed a complaint with all false and unfounded allegations before the President of India that the petitioner has incurred a disqualification for being a Member of Parliament by reason of being allegedly

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appointed as defence counsel of the then Chief Minister of State of Tamilnadu; that such claim was ex-facie baseless since there could be no such appointment, and as such, there was no appointment at all; that the complaint is said to have been made by the second respondent along with 40 other persons since it could be seen from the copy of the petition that the signatures of 40 names are found; but, absolutely no details of those persons are given; that since the allegation found in the petition that he was appointed as a defence counsel, was not true, there was no question of earning moneys and several monetary benefits as an Official counsel; that the other allegation was that the petitioner has not suspended his practice as an Advocate after becoming a Member of Parliament; that a practicing advocate even after becoming a Member of Parliament, cannot suspend his practice, and thus, this was a representation which was referred to by the President of India to the first respondent for its opinion since the said petition was referred to the first respondent under Article 103 of the Constitution of India and the reference specifically has also stated that the question has been raised before the President of India on the petition filed by the second respondent alleging that the petitioner has "become subject to disqualification" as contended in the petition of the second respondent, and thus, it would be clear that the first respondent was called upon to give its opinion on the specific issue whether the petitioner had incurred disqualification under Article 102(1) by being appointed as a defence counsel by the State Government on behalf of the then Chief Minister of the State, and hence, the opinion of the first respondent which was sought for by the President of India under Article 103(2), was only on and in respect of the allegations made in the complaint of the second respondent; and that in such circumstances, a necessity arose for the petitioner to file this petition before this Court since the first respondent is proceeding to hold the enquiry beyond the scope of the issue referred to it under Article 103(2) of the Constitution thereby resulting in a situation where the scope of enquiry was being expanded and improvised.

5.Added further, the petitioner that there was no clarity as to the exact case which the petitioner should meet; but, the first respondent was proceeding to conduct a full-fledged enquiry without acceding to the request for deciding the maintainability of the complaint of the second respondent as a preliminary issue; that the first respondent was neither acting in terms of the mandate given to i,t and the duty cast on it under law; that a reading of Article 102(1) of the Constitution would clearly reveal that a person shall be disqualified for being chosen as and for being a Member of either of the Houses of Parliament if he holds any office of profit under the Government of India or any State Government other than an office declared by the Parliament by law not to disqualify its holder; that while Article 103 of the Constitution provides that if any question arose as to whether a Member of either of the Houses of Parliament has become subject to any of the disqualifications

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mentioned in Article 102(1), the question shall be referred to the decision of the President of India and his decision shall be final; that Clause 2 of Article 103 mandates that the President of India before giving any decision on any such question shall obtain the opinion of the first respondent Election Commission and shall act according to such opinion, and thus, the very reading of Articles 102(1) and 103(2) of the Constitution would clearly show that when a question arose as to whether a Member of Parliament has incurred any disqualification under Article 102, such question should be referred to the first respondent for its opinion; that from the very reading of either Articles, it would be very clear that the President of India before giving any decision on any such question, should obtain the opinion of the first respondent and has also to act according to such opinion; that it is pertinent to point out that insofar as the opinion made and placed by the first respondent before the President of India, no remedy either by way of appeal or revision is available; and that under the circumstances, the first respondent must exercise care and act in accordance with law before rendering such opinion.

6.It is further contended by the petitioner that the issue referred to the first respondent for its opinion, can and ought to be only with reference to the specific allegation which is raised, as the reason to contend that a Member of Parliament has incurred a disqualification; that the very reading of the complaint given by the second respondent would indicate that it was only on the basis of the alleged appointment of the petitioner as defence counsel and that was the only issue referred for the opinion of the first respondent, and hence, the first respondent cannot travel beyond and enquire except the specific allegation, which, according to the second respondent, is that the petitioner suffered disqualification; and that the first respondent Election Commission should confine only to the said issue alone since the first respondent is not conferred with any suo moto powers of enquiry into any question as to whether a Member of Parliament has incurred any disqualification under Article 102 of the Constitution.

7.Placing reliance on Sec.146(1) of the Representation of People Act, 1951 (hereinafter referred to as R.P. Act), the petitioner would add that the first respondent Election Commission is empowered to conduct an enquiry in terms of the said provision; that under Sec.146(1) of the R.P. Act, the first respondent should first consider whether an enquiry is necessary or proper; that when the Election Commission thinks it necessary or proper to make an enquiry, the next stage is that the Commission should satisfy whether the affidavits filed and documents produced in such enquiry by the parties concerned, of their own accord, would be sufficient to form an opinion; that if the Election Commission is of the opinion that it cannot come to a decisive opinion on those materials, then the Commission would have the powers of Civil Court to summon any person, examine them, etc.; that had the Election Commission considered

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the allegations made in the complaint of the second respondent, in view of the preliminary objections raised, it should have come to the conclusion that the enquiry was neither necessary nor proper, and it should have dropped the same, but not done so; that even in the second stage, the Election Commission should have considered the affidavits filed and the documents produced by the parties; that it is pertinent to point out that the second respondent though given opportunity to file affidavit and produce documents on or before 15.5.2006, he has not done so; that he has not even shown any interest in the prosecution of the complaint, and thus, it would be quite clear that he himself has dropped the complaint; that while the matter stood thus, the first respondent has written to the Chief Secretary of the State of Tamilnadu on 18.8.2006, to furnish the exact dates of the appointment of the petitioner to the post of Senior Defence Counsel to the former Chief Minister along with the terms and conditions of appointment and terms regarding fees and emoluments; that the Government of Tamilnadu did not reply for a few months and subsequently, there was a reminder also; that thereafter, the Chief Secretary to the Government of Tamilnadu addressed a communication dated 20.10.2006, wherein he did not assert whether the petitioner was appointed as Senior Defence Counsel to the former Chief Minister since there was no appointment at all; that the Chief Secretary should have stopped with such a reply, but has furnished wholly irrelevant, unjustified and incorrect facts that the petitioner attended cauvery water dispute matters and has performed air journeys to New Delhi in that regard, and the cost of the air tickets were settled by the Public Works Department, and while he got accommodation in the Parliamentary Secretariat, he had been occupying Room No.209 in Tamilnadu House, New Delhi, and the moneys were due from him as room rent, catering charge, etc.; that from the very reading of the communication of the Chief Secretary, it would be quite clear that there was no order of appointment issued to the petitioner; that he had also neither claimed nor been paid any professional fee in that regard; that the claims made by the Chief Secretary in the said communication, were thoroughly irrelevant to the specific query raised by the first respondent to the State Government; and that since the clear and emphatic answer to the query was in the negative, which was borne from the reply, the first respondent should have dropped the matter; but, it has proceeded on the irrelevant facts which were stated by the Chief Secretary in his letter.

8.The petitioner would further submit that on receipt of the notice, the petitioner wrote to the first respondent on 20.12.2006, requesting the Election Commission to give him the authenticated copies of the records said to be relied upon in the communication dated 20.10.2006, of the Chief Secretary in order to send his detailed response; but, in his reply, he has given the details of the exchange order and ticket particulars provided by the State Government for air journeys and informed the petitioner that he should file the written statement on or

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before 19.1.2007; that the petitioner gave a detailed preliminary objection stating that the first respondent was to tender its opinion on the issue referred to by the President of India, and in respect of the other matters if the Election Commission is allowed to proceed with the enquiry, it would be beyond the scope of the reference; that the jurisdiction being exercised by the first respondent, is only advisory, and hence, the scope of the enquiry to be undertaken, should be confined as to the specific issues raised before the President of India on which alone the opinion was sought for, and thus, the issues raised in the communication from the Chief Secretary, were clearly outside the purview of and beyond the scope of the allegations made by the second respondent; and that the information placed by the Chief Secretary to the State and the issues that arose out of those facts, cannot be the subject matter of any consideration of the first respondent for having an opinion in the matter.

9.Added further, the petitioner that while the second respondent had made two specific allegations as they are the grounds of disqualification incurred by the petitioner, that could be the subject matter before the first respondent referred to for its opinion which is also evident from the very wording of the communication that emanated from the Office of the President of India to the first respondent; but, the first respondent had chosen to hold a full-fledged enquiry even without framing the preliminary issue as to the very maintainability of the complaint at the instance of the second respondent which action would not only cause unnecessary expenditure, time and effort, but also he would be subjected to hardship and prejudice by undergoing an ordeal of a full-fledged enquiry.

10.The petitioner would further contend that the first respondent which is a quasi judicial authority, is duty bound to exercise its powers given by law; but, the approach of the first respondent is contrary to the sanctified duty and the character which it should exercise.

11.Commenting on the non-production of the letter dated 25.4.2006, issued by the first respondent to the second respondent calling upon him to file an affidavit and also produce the documentary evidence on or before 15.5.2006, the petitioner would contend that the second respondent has neither filed the affidavit nor produced the documents nor cared to do it till this date; but, on the service of the communication, the petitioner sought for the reply as to the scope of the proposed enquiry; that having waited till 7.5.2007, and since he could not receive the reply, he moved this Court on 8.5.2007 since the Election Commission had fixed the date of enquiry on 10.5.2007; and that under the circumstances, the respondents cannot be permitted to say that the petitioner has approached the Court even before receiving the reply.

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12.Placing reliance on the decision of the Privy Council reported in AIR 1936 PRIVY COUNCIL 253 (2) (NAZIR AHMAD V. KING-EMPEROR), the petitioner would submit that the first respondent should exercise the powers in the manner in which it is contemplated and not otherwise.

13.Placing reliance on the decision of the Apex Court reported in AIR 1988 SUPREME COURT 1531 (A.R.ANTULAY V. R.S.NAYAK AND ANOTHER), the petitioner would urge that the first respondent cannot enlarge its advisory jurisdiction into one of original jurisdiction which is not vested.

14.Added further, the petitioner that the case of the first respondent that the practice followed by the first respondent in such cases, is to canvass the necessary particulars from the concerned State Government, and accordingly, it has been done in the instant case, and when the reply was given by the Chief Secretary to the State of Tamilnadu, all other particulars have been given, and those particulars can also form part of the subject matter of enquiry since they are incidental has got to be rejected; that it would be quite clear that the plea of the first respondent was that it has powers to travel beyond the subject matter which was referred to by the President of India for its opinion; that a comparison of the original complaint given by the second respondent, and the present subject as could be seen from the communication of the first respondent to the petitioner as the subject matter of enquiry would reveal that they are different and thus, the Election Commission wants to call a new matter as incidental.

15.Making his further submissions, the petitioner would urge that while the representation made by the second respondent on which opinion was asked for by the President of India from the first respondent, is pending enquiry, the second respondent who never appeared or filed affidavit nor produced any documentary proof on the allegations made, had given a complaint before the Inspector General of Police, Crime Branch CID, Madras, on 18.2.2007, alleging the commission of certain offences by the petitioner on the strength of which a case came to be registered in Crime No.6/2007 on 28.11.2007; that a reading of the averments made in the F.I.R., would indicate that they are exactly the reproduction of the same allegations found in the communication dated 20.10.2006, of the Chief Secretary, Government of Tamilnadu, to the Election Commission, and thus, two parallel proceedings are now pending, one before the Election Commission and the other before the criminal forum; that under such circumstances, if the petitioner is compelled to come out with his defence in respect of the said facts and issues before the first respondent, it would greatly prejudice his defence which he might take, and the same could be used against him by the prosecution to fill up the gaps and lacunas, which would be nothing but against the constitutional guarantees, and hence, the first respondent Election Commission

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should not proceed with the enquiry on those issues. In support of his contention, the petitioner relied on a decision of the Apex Court reported in (1988) 4 SCC 319 (KUSHESHWAR DUBEY V. BHARAT COKING COAL LTD. AND OTHERS) and in (2004) 7 SCC 27 (STATE BANK OF INDIA AND OTHERS V. R.B.SHARMA).

16.Advancing the arguments on behalf of the first respondent, the learned Senior Counsel Mr.G.Rajagopal, would submit that pursuant to the receipt of the communication from the Office of the President of India under Article 103(1) of the Constitution asking its opinion on a petition submitted by the second respondent alleging that the writ petitioner should be disqualified, the Election Commission proposed to conduct an enquiry in order to formulate its opinion and place before the President of India under Article 103(2); that the petition filed by the second respondent did not contain the date or other relevant particulars relating to the alleged appointment of the writ petitioner as claimed in that petition; that the Election Commission asked the Tamilnadu Government to furnish all the necessary particulars by a communication dated 17.10.2006 relating to the alleged appointment of the writ petitioner as the defence counsel as referred to therein; that whenever a reference is received under Article 103(2) of the Constitution from the President of India or under Article 192 from the Governor of the State, it has been the practice followed by the Election Commission to call for such details from the respective State Government in view of the powers conferred under Sec.146 of the R.P. Act, 1951; that while such information was called for, the State Government sent a reply on 20.10.2006, wherein it is stated that no formal appointment of the petitioner as the Counsel of the Government was made; but, he has represented the State Government in Cauvery Water Disipute matters and had undertaken several journeys to New Delhi and had come back on Government cost and was also occupying a room in Tamilnadu House, New Delhi, for almost three years in addition to the flat allotted to him by the Parliamentary Secretariat; that when a notice was served upon the petitioner, he was provided with all the documents including the letter sent by the State Government, for the reply; that instead of making his appearance, the petitioner raised an objection that the Election Commission of India could only look into the allegations made in the original petition and cannot look into the issues that might have come into subsequently; that after the completion of the pleadings, the Election Commission fixed the date of hearing on 10.5.2007; that while the matter stood thus, the petitioner sought for a clarification as to whether the hearing could be on the preliminary issue; that he was duly informed by the Election Commission that the hearing would not only be covering the issues in the original petition, but also other points covered in the State Government's reply as well; that the State Government has provided information in its reply; that this information is prima facie or somewhat connected to the issue raised in the complaint, and hence, it cannot be termed as totally extraneous to the issue; that there is no impropriety in

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hearing all the issues involved, by the Election Commission; and that it is open to the petitioner to raise those issues including the preliminary issue, before the Election Commission, and the Election Commission has to perform constitutional obligation in accordance with law.

17.Added further the learned Senior Counsel that if the representation made by the complainant before the Office of the President of India, is vexatious or frivolous, even then it cannot be rejected by the Office of the President of India, and necessary information has got to be called for, and it is for the Election Commission to decide whether an enquiry is necessary or proper; that in a given case when the final decision was taken by the President of India on the opinion of the Election Commission, it is always a matter for judicial review; that the petitioner can maintain an application only at the stage if he was aggrieved by the final decision taken; that even if the petitioner is aggrieved over the opinion of the Election Commission, which formed basis for such a decision, if went against him, he can canvass all these legal and factual contentions at that stage, but not at this stage; that the stage to decide whether those particulars furnished by the Chief Secretary to the State, are useful or necessary has not arisen; that even before that, the petitioner has brought forth this petition; that even assuming that those particulars would form part of the enquiry and would also be acted against him, it would be too premature and the writ petition itself has been brought forth in anticipation of certain things, but without any basis whatsoever.

18.The learned Senior Counsel would further submit that the very reading of Sec.146(2) of the R.P. Act would clearly reveal that the Election Commission has got powers to call a person to furnish information on such points or matters which, in the opinion of the Election Commission, might be useful for or relevant to the subject matter of the enquiry; that in view of the powers vested on the Election Commission under Sec.146(2), the Chief Secretary to the State of Tamilnadu was required to furnish certain things; that accordingly, he has furnished; that whether they are on such points or matters and whether they are useful for or relevant to the subject matter of enquiry has not yet been decided; that under the circumstances, the petitioner cannot prevent the Election Commission from looking into those materials; that the contention of the petitioner's side that the subject matter of enquiry can only be the allegations which, according to the second respondent, constituted the grounds of disqualification; but, what is referred to by the President of India for the opinion of the Election Commission is as to whether the petitioner held any office of profit under the Government of India or the Government of any State; that "office of profit" has got very wide dimension; that the particulars submitted by the Chief Secretary, have got some prima facie material, and they are somewhat connected to the issue; that the petitioner cannot compel the Election Commission to conduct the

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enquiry in a particular way; that it is the discretion of the Election Commission to follow its procedure, and it is also strictly acting in conformity with the provisions of law; that the principles of natural justice have been strictly followed; that the petitioner has never questioned the jurisdiction of the Election Commission; that the writ petition is not maintainable; that it is not a fit case where the Court could exercise its powers to grant the discretionary relief of mandamus, and hence, the writ petition has got to be dismissed.

19.In support of his contentions, the learned Senior Counsel for the Election Commission relied on the decisions of the Apex Court reported in AIR 1993 SUPREME COURT 412 (KIHOTA HOLLOHON V. ZACHILHU AND OTHERS) and in AIR 1978 SUPREME COURT 1608 (STATE OF PUNJAB V. GEETA IRON & BRASS WORKS).

20.Advancing the arguments on behalf of the second respondent, the learned Senior Counsel Mr.R.Viduthalai, would submit that the writ petition is not maintainable at the present stage; that it is also not maintainable in view of the alternative remedy available to the petitioner before the first respondent Election Commission; that the Election Commission has acted well within its powers as envisaged under Sec.146(1) and (2) of the Representation of People Act, 1951; and that the last contention of the petitioner that there were parallel proceedings is not correct.

21.Taking the Court to Articles 102(1) and 103(2) of the Constitution, the learned Senior Counsel would urge that the second respondent placed the complaint before the President of India with the specific allegations urged that the petitioner has suffered disqualification on the grounds mentioned in Article 102(1) of the Constitution; that the President of India, in view of the powers conferred under Sec.103(2), called for the opinion of the first respondent Election Commission; that on receipt of the said communication, the first respondent in exercise of its powers under Sec.146 of the R.P. Act in strict adherence thereto, has followed the procedure; and that while doing so, the first respondent has addressed a communication to the Chief Secretary to the State of Tamilnadu calling for the necessary particulars.

22.Placing reliance on Sec.146(2) of the R.P. Act and making emphasis on the words "shall also have the power", the learned Senior Counsel would submit that the powers vested on the Election Commission under Sec.146(2) of the R.P. Act is additional to the powers vested under Sec.146(1); that in exercise of the powers under Sec.146(2), the Election Commission can require any person subject to the privilege which might be claimed by that person under any law for the time being in force, to furnish information on such points or matters as in the opinion of the Election Commission might be useful for or relevant to the subject matter of the enquiry; that accordingly, in the instant case, the Election Commission required the Chief

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Secretary of the Tamilnadu State to furnish information on the question of disqualification of the petitioner herein; that the information sought for by the first respondent and placed by the Chief Secretary to Tamilnadu Government, in the opinion of the first respondent, was useful and also relevant to the subject matter of enquiry; that the subject matter of enquiry was not the contents or the grounds of disqualification urged by the second respondent in his complaint dated 24.3.2006; but, the subject matter of reference placed before the Election Commission for its opinion by the Office of the President of India, was the question of disqualification of the petitioner; that under the circumstances, it would be futile on the part of the petitioner to state that the Election Commission has proceeded to enquire into the matter beyond the scope of reference placed before it, thereby making excess of the powers conferred on it, and hence, the second respondent was to give its opinion on the said subject matter.

23.Added further learned Senior Counsel that though the petitioner has asked the relief of a writ of mandamus, a very reading of the affidavit would indicate that the relief sought for, is virtually in the nature of prohibition; that the President of India, as the constitutional head, in exercise of his powers, has called for the opinion of the first respondent Election Commission; that the first respondent, in turn, is to perform its constitutional obligation and to place its opinion after making the necessary enquiry; that the petitioner has filed the preliminary objection, and he has also been served with a notice for appearance; that under the circumstances, he has to appear and file his written statement and can raise all objections including the preliminary one; that instead, he has approached this Court while the first respondent is making an enquiry by exercise of the powers vested on it; that the petitioner cannot call an interference by approaching the Court; that it is always open to the petitioner to challenge the final decision of the constitutional head if against him and if he is aggrieved over the same; that under Sec.146-B of the R.P. Act, the Election Commission shall have the power to regulate its own procedure; that after the final decision is taken, if the petitioner has got any grievance as to the jurisdictional error or procedure, it is always open to him to challenge the same by filing necessary petition invoking the writ jurisdiction, but not at this stage and that too, even before the commencement of the enquiry; and that under the circumstances, the filing of the writ petition is not only against the settled principles of law, but also would indicate the unnecessary apprehension in the mind of the petitioner which is not based on reason.

24.In support of the above contentions, the learned Senior Counsel relied on a Full Bench decision of this Court reported in AIR 1985 MADRAS 55 (K.S. HAJA SHAREFF V. GOVERNOR OF TAMIL NADU). He also relied on the decisions of the Apex Court reported in AIR 1978 SUPREME COURT 1609 (THE ELECTION COMMISSION OF INDIA V. N.G. RANGA AND OTHERS) and in AIR 1965 SUPREME COURT 1892 (BRUNDABAN NAYAK V. ELECTION COMMISSION OF INDIA AND

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ANOTHER) and also the decision of this Court reported in AIR 1968 MADRAS 234 (R.SIVASANKARA MEHTA V. ELECTION COMMISSION OF INDIA AND ANOTHER).

25.Added further the learned Senior Counsel that the contention of the petitioner that there are two parallel proceedings on the same set of facts, one before the Election Commission and the other before the criminal forum, and if he is directed to file his written statement before the Election Commission, he has to necessarily put forth his defence which might be used against him in the Court of criminal law cannot be countenanced for the reason that as far as the Election Commission was concerned, he has already submitted to jurisdiction by filing preliminary objections, and enquiry has got to be commenced and completed as expeditiously as possible since the petitioner has got his term only till April 2008; that apart from this, the criminal case already registered, is only at the initial stage of investigation, and hence, it cannot be construed as proceedings. The learned Senior Counsel in support of his contentions, placed reliance on a decision of the Apex Court reported in 2007 (5) CTC 632 (INDIAN OVERSEAS BANK AND ANOTHER V. P.GANESAN AND OTHERS).

26.Anxious consideration was paid on the submissions made by the petitioner in person and the learned Senior Counsel on the other side.

27.The petitioner, a sitting Member of Parliament in the Rajya Sabha, has sought for a writ of mandamus seeking direction to the first respondent Election Commission of India, to confine the intended enquiry in Reference Case No.43 of 2006 on the allegations contained in the petition of the second respondent dated 24.3.2006, by forbearing the first respondent from enquiring into any other allegations which were not referred in terms of Article 103 of the Constitution of India by the first respondent. Admittedly, the second respondent, a practicing Advocate, addressed a written representation dated 24.3.2006, to the President of India alleging that the petitioner has incurred disqualification for being a Member of Parliament in terms of Article 102 of the Constitution. The President of India in exercise of the powers under Clause (1) of Article 103 referred the same to the Election Commission by a communication dated 17.4.2006, for its opinion. The Election Commission which decided to enquire into the question, called upon the second respondent to provide information about the date of appointment of the petitioner to the alleged office and all relevant documents to support his contention by 15.5.2006. It is not in controversy that the second respondent did not furnish the requisite details within the prescribed time. Hence, the Election Commission of India thought it fit to call for the information/documents from the Chief Secretary to the Government of Tamilnadu, Madras, and accordingly, addressed a communication on 17.10.2006 for the said purpose to enable it to formulate its opinion in the matter and forward the same to the President of

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India. The Chief Secretary to the Government of Tamilnadu, in turn, sent his reply on 20.10.2006, placing certain particulars.

28.At this juncture, it would be more apt and appropriate to have a scrutiny of the three documents namely (1) the representation of the second respondent dated 24.3.2006; (2) the communication addressed by the Election Commission of India to the Chief Secretary dated 17.10.2006 and (3) the reply of the Chief Secretary to the Election Commission of India dated 20.10.2006. The second respondent sought for disqualification of the petitioner in his complaint dated 24.3.2006, only on the following two grounds:

> "(1) The petitioner is holding the post of Senior Defence Counsel to the Government Servant, the Hon'ble Chief Minister of Tamilnadu, in her several cases instituted both by the Central Government and by the Tamilnadu State Government and earning a huge sum and several benefits monetarily as the official counsel for the Hon'ble Chief Minister of Tamilnadu; and
> (2) The petitioner being a Lawyer who has taken oath of secrecy while registering his name as an Advocate in the Bar Council of India, even after becoming as M.P., has not suspended his practice as an Advocate."

29.Except the above two grounds, nothing more is noticed in the said representation. The Election Commission of India which could not get any reply from the Chief Secretary for its earlier communication dated 18.8.2006, addressed another communication on 17.10.2006 wherein it called for information/documents from the Chief Secretary to enable the Commission to formulate its opinion in the matter. A query was made by the Election Commission on the following:

> "a.Whether Sh.N.Jothi, MP (Rajya Sabha) was appointed by the State Govt. as its counsel/counsel for the former Chief Minister, as claimed in the petition filed before the Hon'ble President of India by one Shri R.Amernath Rao, at any point of time after 3-04-2002 (the date from which the current term of Sh.Jothi as Member of Rajya Sabha commenced).
> b.If he was so appointed by the State Govt., a copy of the order relating to such appointment and copies of documents relating to terms and conditions of the appointments including terms regarding payment of fees and emoluments, may be submitted to the Commission."

30.On receipt of the said communication, the Chief Secretary gave his reply on 20.10.2006, which contained the following.

> "In the letter cited above, certain details regarding appointment if any issued to Thiru N.Jothi, Member of Parliament (Rajya Sabha) was called for by the Election Commission of India.....

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Sl.No.	Exchange order No. and Date	Ticket No.	Amount spent Rs.
1 to 9.....			
10	Total		2,43,240

The cost of air tickets were settled to the Indian Airlines by the Public Works Department, Government of Tamil Nadu. Thiru N.Jothi, himself has certified the above air journeys performed by him, in connection with the Cauvery Water disputes on behalf of the State of Tamil Nadu. The Counsels appearing on behalf of the State of Tamil Nadu are eligible for fees, though Thiru N.Jothi, Member of Parliament, has not claimed fees.

2.It is also gathered that he was allotted accommodation by the Parliamentary Secretariat from 29th October 2002 at the following address:-

Flat No.303,
Swarna Jayanthi Sadan
MS Flats
Bhishamber Das Marg (Dr.BDMarg)
New Delhi.

3.However, he has also been occupying Room No.209 in Tamil Nadu House, (Kautilya Marg New Delhi) from 27.8.2003 to 11.5.2006. A sum of Rs.7,95,264/- (Rupees seven lakhs ninety five thousand two hundred and sixty four only) towards the room rent, catering charges, telephone and transport charges have not been settled by him so far. Independently, the Reception Office of the Tamil Nadu House, New Delhi is taking steps to recover the same.

4.No appointment order engaging him as a Counsel has been issued by the State Government. However, the details set out above reveal that he had also enjoyed the above mentioned privileges without any formal orders at the cost of the State Government.

5.This is for information and appropriate action by the Election of India."

31.From the scrutiny of the above documents, it would be quite clear that while information/documents were called for from the Chief Secretary by the Election Commission on 17.10.2006, on the query whether the petitioner was appointed by the State Government as its Counsel for the former Chief Minister as claimed in the petition filed by the second respondent at any point of time after 3.4.2002, the date from which the current term of the petitioner as Member of Parliament has to be commenced and if appointed, all other particulars and copies of the documents relating thereto may be submitted, the Chief Secretary by reply dated 20.10.2006, had made it clear that no appointment order engaging him as Counsel, was issued by

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the State Government, but has given details that he has performed journeys to New Delhi, travelled on several occasions by air and attended Cauvery Water Dispute matters, and the cost of the air tickets to the tune of Rs.2,43,240/- was settled by the Public Works Department, Government of Tamilnadu, and though he was eligible for the fee, he did not claim the same, and apart from that, by occupying Room No.209 in Tamil Nadu House, New Delhi, from 27.8.2003 to 11.5.2006, a sum of Rs.7,95,264/- towards the room rent, catering charges, telephone and transport charges have not been settled, and the Reception Office of Tamilnadu house was taking steps to recover the same. Thus, all the information above mentioned, were thoroughly extraneous to the query that was made which, in the opinion of the Court, the Chief Secretary was not called upon to furnish.

32.Admittedly, the second respondent complainant who lodged a complaint before the President of India on 24.3.2006, neither filed an affidavit nor placed documents nor appeared before the Election Commission. But, the Election Commission has made the above query on the strength of the complaint of the second respondent dated 24.3.2006, which was addressed to the President of India and in turn, placed in the hands of the Election Commission, and that was the only material available which resulted in the above reply containing all extraneous particulars.

33.As could be seen above, the entire submissions made both factually and legally on both sides, would center round upon the question whether the first respondent Election Commission can proceed to enquire on the strength of the reply given by the Chief Secretary to the State of Tamilnadu. Before adverting to the controversy, it would be fit and proper to look into the legal position which is relevant for the case.

34.Speaking of the powers of Election Commission, Sec.146 of the Representation of People's Act reads as follows:

> "146.Powers of Election Commission:- (1) Where in connection with the tendering of any opinion to the President under article 103 or, as the case may be, under sub-section (4) of section 14 of the Government of Union Territories Act, 1963 (20 of 1963), or to the Governor under article 192, the Election Commission considers it necessary or proper to make an inquiry, and the Commission is satisfied that on the basis of the affidavits filed and the documents produced in such inquiry by the parties concerned of their own accord, it cannot come to a decisive opinion on the matter which is being inquired into, the Commission shall have, for the purposes of such inquiry, the powers of a Civil Court, while trying a suit under the Code of Civil Procedure, 1908 (5 of 1908), in respect of the following matters, namely:-
>
> (a)summoning and enforcing the attendance of any person and examining him on oath;

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(b) requiring the discovery and production of any document or other material object producible as evidence;
(c) receiving evidence on affidavits;
(d) requisitioning any public record or a copy thereof from any Court or office;
(e) issuing commissions for the examination of witnesses or documents.
(2) The Commission shall also have the power to require any person, subject to any privilege which may be claimed by that person under any law for the time being in force, to furnish information on such points or matters as in the opinion of the Commission may be useful for, or relevant to, the subject-matter of the inquiry."

35. As could be seen from the above provision, the Election Commission enjoys the powers to exercise in connection with the tendering of any opinion to the President of India under Article 103 or to the Governor under Article 192. That apart, it can take a decision whether it is necessary or proper to make an enquiry on the subject matter of reference. If the Election Commission considers the enquiry necessary or proper, it can formulate its opinion on the basis of the affidavits filed and the documents produced in such enquiry by the parties concerned of their own accord. If the Commission is satisfied that it cannot formulate a decisive opinion in the matter with the above materials, it can have the exercise of the powers of a Civil Court while trying a suit under the Code of Civil Procedure. Under sub-section (2) of Sec.146, the Election Commission is also vested with the power to require any person subject to the privilege enjoyed by him, to furnish information on such points or matters as in the opinion of the Commission might be useful or relevant to the subject matter of the enquiry. The word "also" used in sub-section (2) will make the legislative intent clear that this power of requiring any person to furnish information was in addition to the powers vested under sub-section (1). The case of the petitioner who seeks the relief, is that the first respondent Election Commission is acting in excess of its powers vested under Sec.146 of the R.P. Act, while the respondents would urge that the proposed enquiry by the Election Commission was well within its powers as envisaged under the above provision. In the instant case, the Election Commission on receipt of the communication from the President of India, considered it necessary to make an enquiry. This Court is unable to notice any illegality or informity in the first respondent Election Commission calling upon the Chief Secretary to the State of Tamilnadu to furnish information on the query made in its communication dated 17.10.2006. The petitioner who was served with a notice on 4.12.2006, after sending his letter on 20.12.2006, has sent his preliminary objections on 18.1.2007. Though not the petitioner appeared before the Election Commission in person by sending the preliminary objections, it can be well stated that he has subjected himself to the

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jurisdiction of the Election Commission, and thus, on his appearance, he is to file his written statement, and the Election Commission has to proceed with the enquiry.

36.Now, the controversy between the parties is in respect of the scope of the enquiry. According to the petitioner, the first respondent in exercise of the powers, can conduct the enquiry only on the allegations setting out the grounds of disqualification, and nothing more. On the contrary, the respondents would urge that the writ petition is not maintainable, and the first respondent can hold the enquiry on the materials available and also the information furnished by the Chief Secretary of the State. The contention put forth by the respondents' side that the writ petition is not maintainable for the reason though the relief sought for in the petition is for a writ of mandamus, it is virtually a writ of prohibition, and the petitioner can neither seek the relief nor the Court could grant since it will be restraining the first respondent Election Commission from doing its constitutional obligation which it has to perform pursuant to the directions of the President of India, and also on the ground that after the final decision is taken by the President of India on the basis of the opinion of the first respondent Election Commission, the petitioner, if aggrieved, can very well challenge the same by filing a writ petition like this cannot be countenanced for more reasons than one. The petitioner has sought for a writ of mandamus to direct the first respondent Election Commission to confine the intended enquiry in Reference Case No.43 of 2006 on the allegations contained in the petition of the second respondent dated 24.3.2006, by forbearing the first respondent from enquiring into any other allegations, which were not referred to in terms of Article 103 of the Constitution of India. The very reading of the relief sought for by the petitioner, would make it clear that the enquiry proposed to be made by the first respondent, should be confined to the allegations contained in the petition of the second respondent dated 24.3.2006.

37.The Court cannot prohibit the first respondent Election Commission from conducting an enquiry in order to formulate an opinion and place before the President of India. But, it would not mean that the first respondent can assume certain powers which are neither vested by law nor do it possess to conduct an enquiry on the extraneous matters which were not the subject matter of reference. Writ of mandamus can be issued by the Court not only to direct a quasi judicial authority to do an act which the law requires it to do, but also to restrain the authority from doing the act which it is not empowered to do.

Hence, the relief what is sought for by the petitioner cannot be said to be in the nature of a writ of prohibition.

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38.Added further, the decision relied on by the learned Senior Counsel for the second respondent reported in AIR 1978 SUPREME COURT 1609 (THE ELECTION COMMISSION OF INDIA V.

N.G.RANGA AND OTHERS), cannot be applied to the present facts of the case for the simple reason that it was a case where the petitioner therein sought for a writ of prohibition to restrain the Election Commission from proceeding with the enquiry and also to quash the notice issued by the Election Commission for the enquiry which, in the opinion of Their Lordships, could not be granted since the Election Commission has issued the notice for the conduct of an enquiry which was a constitutional obligation which the Election Commission was to perform, and hence, such a writ could not be issued. But, that is not the case noticed by the Court in the instant writ petition. In such circumstances, this Court is of the considered opinion that the relief sought for is strictly in the nature of a direction to the Election Commission to confine the enquiry on the complaint and if done beyond that, it would be in excess of the powers vested on the Election Commission. The rule of law mandates that where a power is given to an authority to do a certain thing in a certain way, that thing must be done in that way and not at all.

39.A Division Bench of the Bombay High Court consisting of Chief Justice Chagla and Tendolkar J, as they then were, in a case reported in AIR 1956 BOMBAY 530 (S.C.PRASHAR AND ANOTHER V. VASANTSEN DWARKADAS AND OTHERS), has held thus:

> "In our opinion the want of jurisdiction pleaded by the petitioner in the case before us is undoubtedly a patent one, and if it is a patent want of jurisdiction, not only we would be rightly exercising our discretion in interfering, but according to English Courts, it would be our duty and our obligation to prevent an authority from assuming jurisdiction which it patently does not possess."

40.In a democratic society like India, Courts must and do exist for not only setting right the wrongs done, but also to prevent the wrongs being done. The contention of the respondents' side that after the passing of the final decision, the petitioner if aggrieved, can approach the Court for his necessary remedy would be driving the citizen to approach the Court of law after his rights are invaded and infringed and after he suffers an injury along with the stigma. It would be worthwhile to reproduce the decision of the Supreme Court reported in AIR 1988 SUPREME COURT 1531 (A.R.ANTULAY V. R.S.NAYAK AND ANOTHER) wherein it has been held as follows:

> "41.... The power to create or enlarge jurisdiction is legislative in character, so also the power to confer a right of appeal or to take away a right of appeal. Parliament alone can do it by lay and no Court. Whether superior or inferior or both combined can enlarge the jurisdiction of a Court or divest a person of his rights of revision and appeal.
>
> 83. The appellant may or may not be an ideal politician. It is a fact, however, that the allegations have been brought against him by a person

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belonging to a political party opposed to him but that is not the decisive factor. If the appellant Shri Abdul Rahman Anthulay has infringed law, he must be dealt with in accordance with law. We proclaim and pronounce that no man is above the law, but at the same time reiterate and declare that no man can be denied his rights under the constitution and the laws. He has a right to be dealt with in accordance with law and not in derogation of it.

85... The basic fundamentals of the administration of justice are simple. No man should suffer because of the mistake of the Court. No man should suffer a wrong by technical procedure of irregularities. Rules or procedures are the hand-maids of justice and not the mistress of the justice. Ex debito justitiae, we must do justice to him. If a man has been wronged so long as it lies within the human machinery of administration of justice that wrong must be remedied."

41.The main controversy between the parties as could be seen above is whether the first respondent must confine its enquiry only on the allegations which, according to the second respondent, constituted the disqualification of the petitioner as a Member of Parliament or whether the first respondent can conduct a full-fledged enquiry. According to Article 102(1) of the Constitution, a person shall be disqualified for being chosen as, and for being a Member of either House of Parliament - (a) if he holds any office of profit under the Government of India or the Government of any State, other than an Office declared by the Parliament by law not to disqualify its holder. When any question arose as to whether a Member of Parliament has become subject to any disqualification mentioned in Clause (1) of Article 102 as stated above, that question has to be referred for the decision of the President of India, whose decision shall be final. In the instant case, the second respondent placed a complaint specifically alleging that the petitioner has become disqualified to continue as a Member of Parliament on two grounds. The President of India as the constitutional head, in exercise of his powers under Article 103, called for the opinion of the first respondent Election Commission. The words "shall act according to such opinion" employed in Article 103 of the Constitution, would indicate that the opinion of the Election Commission would form basis for the decision of the President which would be final.

42.The second respondent who was intimated by the Election Commission to place affidavit and also the documents in order to prove the allegations in the complaint on or before 15.5.2006, failed to do so. Then, the Election Commission addressed the first communication on 18.8.2006, and the second communication on 17.10.2006. As rightly contended by the learned Senior Counsel for the respondents, the Election Commission of India is vested with additional powers under Sec.146(2) of the R.P. Act

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to call for the Chief Secretary of the State of Tamilnadu to furnish information in order to formulate its opinion in the matter. Under Sec.146(2), the Election Commission can require any person to furnish information on such points or matters as in the opinion of the Commission may be useful for or relevant to the subject matter of enquiry. In the said communication dated 17.10.2006, the Election Commission has called for the information/documents from the Chief Secretary only as to whether Shri N.Jothi, M.P., Rajya Sabha, was appointed by the State Government as its Counsel/Counsel for the former Chief Minister as claimed in the petition filed by the second respondent before the President of India, at any point of time after 3.4.2002, and if so appointed, a copy of the appointment order along with the copies of the relevant documents. Thus, in order to formulate an opinion on the subject matter of the enquiry, the Election Commission called the Chief Secretary of the State to furnish the information on such points and matters mentioned in that letter since, in the opinion of the Election Commission, they might be useful for or relevant to take a decision.

43.The subject matter before the Election Commission can only be the subject matter which was referred to by the President of India calling for the opinion of the Election Commission. The subject matter which was referred to at the time when it was placed before the Election Commission, was only the complaint of the second respondent dated 24.3.2006. The complaint of the second respondent dated 24.3.2006, contained specific allegations in respect of the disqualification on two grounds mentioned therein, and hence, the subject matter of enquiry that was in the hands of the Election Commission, was only to enquire into the question of disqualification on the grounds alleged in the complaint and nothing more. Accordingly, in exercise of the powers under Sec.146(2) of the R.P. Act, the Election Commission has called for the necessary particulars/documents by making a query with regard to that allegation by a communication dated 17.10.2006, as stated supra. Having received the reply from the Chief Secretary containing particulars which were neither called for, but extraneous, the Election Commission cannot be permitted to say that they were incidental to the subject matter in question. Those facts placed by the Chief Secretary in his communication dated 20.10.2006, were not only outside the grounds of disqualification complained of by the second respondent, but also the query that was made by the Election Commission on 17.10.2006. The information placed by the Chief Secretary to the State of Tamilnadu cannot be termed either as incidental or connected to the allegations made by the second respondent in his complaint, which according to him, would constitute disqualification of the petitioner from being a Member of Parliament. It is pertinent to point out that those information were never called for by the Election Commission. The information placed by the Chief Secretary to the State of Tamilnadu, were never intended to be placed or never called for.

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Hence, those information placed by the Chief Secretary, were undoubtedly extraneous to the matter under reference. It remains to be stated that the allegation found in the complaint of the second respondent and the inputs provided by the State Government are different. Accepting such a contention put forth by the respondents' side and allowing the first respondent to do such a full-fledged enquiry, as could be seen from the communication covering the inputs placed by the Chief Secretary to the State of Tamilnadu, would be nothing but allowing the first respondent to conduct an enquiry on the matters which are extraneous to the allegations which, according to the second respondent, would constitute the grounds of disqualification. Undoubtedly, the first respondent is neither vested with nor possesses powers to conduct an enquiry on extraneous matters.

44.At this juncture, it is pertinent to point out that when the complaint was referred to by the President of India to the Election Commission for its opinion, these facts were neither known to the Office of the President of India nor they had an idea about those facts. Even the second respondent who made the complaint before the President of India did not have any idea or knowledge about those facts till he filed the rejoinder on 22.3.2007. The second respondent who had not filed affidavits or produced documents, though called upon to do so by the first respondent Election Commission, had filed the rejoinder in the line of the extraneous information and facts placed by the Chief Secretary in the reply dated 20.10.2006. It has to be stated that the second respondent cannot be permitted to file such a rejoinder containing those extraneous facts furnished by the State Government, when he has not disclosed the same in the original complaint made by him. While the matter stood thus, the first respondent cannot be allowed to say that it has got wide powers under Sec.146(1) and (2) of the R.P. Act and could enquire into on any facts calling it as incidental, or come to the knowledge pending the enquiry. There is no impediment for the second respondent or the
Chief Secretary of the State to place those facts by way of a representation; but, the Election Commission cannot venture to enlarge the scope of the enquiry. It remains to be stated that the subject matter that was referred to by the Office of the President of India to the first respondent was to formulate an opinion on the question of disqualification on the grounds as urged by the second respondent in his complaint, and hence, the contention of the respondents that the subject matter what was referred to by the Office of the President of India to the first respondent, was the question of disqualification on the ground of office of profit, and therefore, it can widen the scope of enquiry cannot be accepted. Allowing the first respondent to widen the scope of enquiry as contended by it, would be nothing but allowing the first respondent to assume powers and jurisdiction which are not conferred under the relevant provision of law, but in excess. As could be seen from the above provision of law, nowhere the Election Commission is conferred with any original jurisdiction, but only advisory

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under Article 103 of the Constitution. Under the circumstances, it becomes necessary to direct the first respondent Election Commission to confine its enquiry only on the grounds of disqualification as urged by the second respondent in his complaint dated 24.3.2006.

45.The next contention put forth by the respondents' side that the petitioner can raise all the contentions regarding all the issues including the preliminary issue,

before the Election Commission cannot be accepted. As could be noticed, it is quite evident that the Election Commission has already decided to proceed with the enquiry and the petitioner has also filed his preliminary objections, and hence, no question of deciding the preliminary issue by the Election Commission would arise. Now, at this stage, the Election Commission has to proceed with the enquiry on the subject matter.

46.The contention put forth by the learned Senior Counsel for the Election Commission that the first respondent Election Commission has not yet decided to take up all the information placed by the Chief Secretary to the State of Tamil Nadu as necessary for the purpose of enquiry cannot be accepted in the face of the contents of the latest letter by the Election Commission to the petitioner stating that the enquiry would include all the inputs made by the State Government.

47.The last contention put forth by the petitioner that there are two parallel proceedings and hence, the Election Commission should be restrained from proceeding with the enquiry cannot be countenanced since this Court is unable to notice any parallel proceedings pending.

48.Accordingly, a direction is issued, and this writ petition is ordered. The petitioner is directed to appear before the first respondent Election Commission on the date fixed for enquiry, and on appearance and filing the written statement, the Election Commission can proceed with the enquiry in the above lines and in accordance with law. No costs. Consequently, connected MPs are closed.

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Sd/
Asst.Registrar

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Sub Asst.Registrar

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To:

The Election Commission of India
Nirvachan Sadhan
Ashoka Road
New Delhi 110 001.

+ 1 cc to Mr. M. Dhandapani, Advocate, SR No.73086

+ 1 cc to Mr. G. R. Associates, Advocate, SR No.73064

+ 1 cc to Mr. S. Senthilnathan, Advocate SR no. 73048

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